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Arjie Serenio v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05(M)-39–01 OF 2017
IDRUS HARUN, ZALEHA YUSOF AND RHODZARIAH BUJANG JJCA
12 JULY 2018

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Criminal Law — Appeal — Appeal against conviction and sentence — Murder — Appellant convicted and sentenced to death — Whether charge of murder had been proven beyond reasonable doubt having regard to injuries suffered by deceased — Penal Code s 300(c)

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The appellant was charged with the offence of murder of one Roldan ('the deceased'). For the element of intention to cause death, the learned judicial commissioner ('the JC') concluded that based on the injuries inflicted, it was reasonable to infer that the injuries would be sufficient in the ordinary course of nature to cause death ('the inference'). At the end of the trial, the appellant was convicted and sentenced to death. The appellant then filed the present appeal against the decision of the JC. The issue raised was whether the charge of murder had been proven beyond reasonable doubt having regard to the injuries suffered by the deceased. The appellant submitted that it was wrong for the JC to make the inference. In this regard, the appellant contended that it must be a medical doctor to say whether the injuries intentionally caused by the appellant and sustained by the deceased was sufficient in the ordinary course of nature to cause death to the deceased. The crux of the appellant's appeal rested on the evidence of the pathologist ('PW9').

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Held, dismissing the appeal:

(1) Although the pathologist stated in the appeal record that the injuries if not given medical treatment would be fatal, she however said 'immediate medical treatment'. It was therefore not a question of delayed treatment. On the facts of the present case there was simply no way such an immediate treatment could be available as the incident did not happen at the hospital nor was there evidence of a doctor present at the time of incident. In other words, there was no possibility of a supervening event which would avoid the fatality of the injuries suffered by the deceased (see para 14).

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(2) In the facts and circumstances of the present case, there was no way the deceased could have survived the particular injury which caused his death which was the severance of the artery that caused profuse bleeding. In this regard and with respect even though the use of the word 'infer' by the JC

might be unfortunate but nonetheless his ultimate finding, that the ingredients under s 300(c) of the Penal Code had been satisfied was right (see para 14).

[Bahasa Malaysia summary

Perayu dituduh dengan kesalahan membunuh seorang yang bernama Roldan ('si mati'). Bagi unsur niat menyebabkan kematian, pesuruhjaya kehakiman yang bijaksana ('PK') memutuskan bahawa berdasarkan kecederaan yang dikenakan, adalah munasabah untuk menyimpul bahawa kecederaan akan mencukupi dalam perjalanan biasa sifat untuk menyebabkan kematian ('inferens'). Pada akhir perbicaraan, perayu disabitkan dan dijatuhkan hukuman mati. Perayu kemudiannya memfailkan rayuan ini terhadap keputusan PK tersebut. Isu yang dibangkitkan adalah sama ada tuduhan membunuh tersebut telah dibuktikan melampaui keraguan munasabah mengambil kira kepada kecederaan yang dialami oleh si mati. Perayu berhujah bahawa ia adalah salah untuk PK membuat inferens. Berkaitan ini, perayu berhujah bahawa ia mestilah doktor perubatan yang menyatakan sama ada kecederaan-kecederaan secara sengaja disebabkan oleh perayu dan dialami oleh si mati adalah mencukupi dalam perjalanan biasa sifat untuk menyebabkan kematian kepada si mati. Teras rayuan perayu bergantung ke atas keterangan patologi ('PW9').

Diputuskan, menolak rayuan:

(1) Walaupun patologi menyatakan dalam rekod rayuan bahawa kecederaan-kecederaan jika tidak diberikan rawatan akan membawa maut, beliau bagaimanapun menyatakan 'immediate medical treatment'. Ia adalah oleh itu bukan soalan rawatan yang lewat. Atas fakta kes ini tidak semudah rawatan segera sedemikian boleh terdapat memandangkan kejadian tersebut tidak berlaku di hospital ataupun terdapat keterangan doktor ada pada masa kejadian tersebut. Dalam perkataan lain, tidak mungkin terdapat kejadian supervening yang mana akan mengelak kematian akibat kecederaan yang dialami oleh si mati (lihat perenggan 14).

(2) Dalam fakta dan keadaan kes ini, tidak sama sekali si mati boleh selamat kecederaan teretntu tersebut yang mana menyebabkan kematiannya yang mana adalah pemutusan arteri yang menyebabkan darah yang meleleh dengan banyak. Berkaitan ini dan dengan hormat walaupun penggunaan perkataan 'infer' oleh PK mungkin adalah tidak sesuai tetapi walau bagaimanapundapatan pentingnya, bahawa unsur di bawah s 300(c) Kanun Keseksaan teah dipenuhi adalah betul (lihat perenggan 14).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

Cases referred to

Cheong Kam Kuen v PP [2013] 1 MLJ 15, FC (distd)
Mohd Yasser bin Shaik Mahmad v PP [2017] 4 MLJ 250, CA (distd)
PP v Visuvanathan [1978] 1 MLJ 159 (refd)

Legislation referred to

Penal Code ss 300(c), 304(a)

Appeal from: Criminal Trial No BKI-45B-1/4 of 2014 (High Court, Kota Kinabalu)

Hamid Ismail (Hamid & Co) for the appellant.
Mohd Hamzah bin Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rhodzariah Bujang JCA:

BRIEF FACTS OF THE CASE

[1] The appellant was charged and convicted of the murder of a work colleague of his named Roldan and sentenced to death by the learned judicial commissioner. He has appealed against the said decision but which appeal we dismissed and our reasons for doing so are set out in this judgment. However before that, for clarity, the charge against the accused is reproduced below:

> That you, on the *24th day of January 2014 at about 4.00 p.m. at the construction's area Kg Sunsuron Tambunan, in the District of Tambunan, in the State of Sabah,* did commit murder by causing the death of one *ROLDAN* and that you have thereby committed an offence punishable under Section 302 of the Penal Code [Act 574] of the Laws of Malaysia.

THE FACTS

[2] The facts which form the thrust of the prosecution's case have been ably laid out by the learned judicial commissioner in his grounds of judgment. These facts are also largely undisputed for at the hearing of the appeal before us, the issue raised was only one — whether the charge of murder has been proven beyond reasonable doubt having regard to the injuries suffered by the deceased.

A THE PROSECUTION CASE

[3] The appellant, the deceased, Charlie Hangad Ladining ('PW6') and Daniel Panes ('PW5') were construction workers and illegal immigrants from the Philippines who were at that material time helping in the construction of one Dr Valentine's house in Kampung Sunsuron in Tambunan, Sabah. PW5 testified that on the day and time in question, at the work site, he saw the appellant attacking the deceased from the back with a sledge hammer. Whilst the first blow landed on the deceased's body, the second struck his head. When he tried to intervene by snatching the sledge hammer from the appellant, the appellant turned on him. In that instant the deceased fled but was chased by the appellant who caught up with him and continued his attack on the deceased with the sledge hammer. PW5 then alerted PW6 and together they ran to the roadside where he contacted another friend called Yusak ('PW3') with his hand phone to inform him about the attack. It was PW3 who then reported the matter to Corp Gobili Asi ('PW1'). PW6 also testified that he witnessed the attack by the appellant on the deceased and that as said by PW5 too, both he and PW5 went into hiding for two days because they were scared for not possessing any valid travel documents. Subsequently, they both came out of their hiding and surrendered themselves to the police.

[4] The next crucial evidence which we must make specific mention of is that of the pathologist. In fact, the crux of the appellant's appeal rests on this evidence of Dr Jessie Hui ('PW9') who was at that material time a forensic pathologist with Queen Elizabeth Hospital. PW9 testified that the cause of the deceased's death was hypovolemic shock due to laceration of the left popliteal artery arising from the comminuted open fracture of the lower shaft of the left femur and upper tibia. The ends of the fractured bone tore the said artery completely causing profuse bleeding, said the doctor further in her post-mortem report (exh P99) and that these injuries were fatal in nature if not given immediate medical treatment.

[5] Based on the aforesaid evidence, the learned judicial commissioner concluded that the ingredients of the charge under s 300(c) of the Penal Code have been made out and which in His Lordship's own words are stated as follows:

(a) that Roldan was dead;

(b) that Roldan died as a result of injuries sustained by him;

(c) that the injuries on Roldan were caused by or the result of the acts of the accused person; and

(d) that by inflicting the injuries on Roldan, the accused person caused them with an intention of causing such bodily injury, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

[6] Of course it was clear from the evidence adduced that ingredients (a) and (b) above have been satisfied. As for ingredient (c), the issue was raised before the High Court that it was not satisfied because firstly, no forensic evidence was adduced to prove that the appellant used the sledge hammer to kill the deceased. Secondly, there was no finger print evidence to prove that the appellant held the same and lastly, the unreliability of PW5 and PW6's evidence as they were initially also suspects in this case. However, all these were no longer issues canvassed at the appeal. For the record, the petition of appeal only contained three grounds and they are couched in general terms as follows:

(1) the learned judicial commissioner had erred in law and in fact for failing to properly evaluate the appellant's evidence on private defence together with the surrounding circumstances of the case;

(2) the learned judicial commissioner had erred in law and in fact for holding at the end of the trial that the prosecution had proved its case beyond reasonable doubt when the evidence and circumstances of the case indicate that the appellant was only guilty of an offence under s 304(a) of the Penal Code; and

(3) the learned judicial commissioner had erred in law and in fact when he convicted the appellant, found him guilty and sentenced him to death by hanging.

[7] The brevity of the grounds of appeal was rendered even more so by the appellant's counsel's submission both oral and written (all of two pages) which confined the argument to solely whether the charge was proven beyond reasonable doubt. However before going into the issue raised, it would be fair for the sake of completeness that we make a brief mention of the appellant's defence.

THE DEFENCE

[8] In his sworn evidence the appellant denied causing the death of the deceased — it was PW5 and PW6 who did it, said he. He did admit, consistent with ground (2) of his petition of appeal that he did have a fight with the deceased over work and women and he struck the deceased but when he left after the fight, the deceased was still alive. He alleged that it was PW5 and PW6 who finished off the deceased after he left in order to cover up a plan hatched by all three of them, that is, PW5 and PW6 and the deceased to kill the appellant. The appellant claimed that prior to the incident, the deceased tried

to strangle him three times and he knew about the plan to kill him from their actions and words spoken to him. He admitted striking the deceased with the hammer a number of times — six or seven times when he caught up with the deceased after the deceased ran off following the first blow at his back. He mentioned that all three of them, ie PW5, PW6 and him were remanded in the same cell after their arrest.

THE APPEAL

[9] Coming back now to the submission of the appellant's counsel, in view of its brevity, the same, except for the first and second introductory paragraphs and the last paragraph, are reproduced below. However, before that, it must be stated that at the hearing of the appeal, the appellant's counsel informed us that he would be relying on only one ground and that would be as stated in para 6 of his written submission. The said written submission reads as follows:

> [3] The main ground in this appeal is whether the charge was proven beyond reasonable doubt based on the consideration of the whole evidence. For ease, the Appellant will be referred to as the 'accused' while the Respondent as the 'prosecution' in this submission.
>
> The Charge Was Not Proven Beyond Reasonable Doubts
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> [5] The prosecution relied on s 300(c) of Penal Code to prove its case against the accused. The learned trial judge found that based on the injuries inflicted, it was reasonable to *infer* that the injuries would be sufficient in the ordinary course of nature to cause death (s 300(c) Penal Code).
>
> [6] It is humbly submitted that the learned trial judge's finding is wrong. The learned trial judge should have not make that finding based on inference. There must be evidence to prove that the injuries sustained by the deceased was sufficient in the ordinary course of nature to cause death. Unfortunately, the pathologist [PW9] did not testify to that effect. The evidence of PW9 can be seen at:
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> — P 219 until the end of Record of Appeal Vol 2
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> — P 231 until P 237 Record of Appeal 2A
>
> — P 287 until 291 Record of Appeal Vol 2A
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> [7] The prosecution must prove that the injuries sustained by the deceased was sufficient in the ordinary course of nature to cause death. And this must be done through a medical officer or pathologist. In the absence of the such evidence, the charge is not proven beyond reasonable doubt:
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> — *Cheong Kam Kuen v PP* [2013] 1 MLJ 15 [Federal Court]
>
> — *Mohd Yasser bin Shaik Mahmad v PP* [2017] 4 MLJ 250 [Court of Appeal]
>
> — *Hanif bin Mohamad Ali v Pendakwa Raya* [2016] MLJU 1763 [Court of Appeal]
>
> (C) Conclusion

[8] For the above reason, the charge was not proven beyond reasonable doubt. The prosecution had only managed to prove a case under s 304(a) of Penal Code. Thus, the accused humbly prays that this appeal be dismissed (sic).

INTENTION TO CAUSE DEATH

[10] The learned judicial commissioner in considering this particular ingredient of the offence referred to the case of *Public Prosecutor v Visuvanathan* [1978] 1 MLJ 159 which held that:

[42] Under cl [c] once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry ceases to be subjective and becomes purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. It is irrelevant and totally unnecessary to enquire what kind of injury the accused intended to inflict. The crucial question always is, was the injury found to be present intended or accidental.

His Lordship then concluded as follows:

[44] In order to prove the above ingredient, this court would have to fall back on the evidence of PW9. In her report [P99] PW9 had stated that there were 39 injuries found on the body of the deceased. The most severe injuries were on the leg and this was the cause of the deceased death.

[45] Apart from the evidence of PW9, the photograph of the injuries sustained by the deceased in itself speaks volume of the force of the blows from the hammer and the brutality of the attack on the deceased body. The photographs show that the deceased leg was almost severed and the bones within the thigh area was crushed and this was caused solely by a blunt object and not even a sharp instrument or weapon. *In the circumstances, I find that based on the injuries inflicted, it reasonable to infer that the injuries would be sufficient in the ordinary course of nature to cause death.* (Emphasis added.)

[11] As shown in para 6 of the appellant's counsel's written submission reproduced above and reiterated at the hearing before us, learned counsel for the appellant submitted it was wrong for the learned judicial commissioner to make that inference. Relying on this court's decision in *Mohd Yasser bin Shaik Mahmad v Public Prosecutor* [2017] 4 MLJ 250, he submitted that it must be a medical doctor to say whether the injuries intentionally caused by the accused and sustained by the victim was sufficient in the ordinary course of nature to cause death to the victim. Besides *Mohd Yasser*'s case the appellant's counsel also relied on the Federal Court's decision in *Cheong Kam Kuen v Public Prosecutor* [2013] 1 MLJ 15 where the charge of murder was reduced to culpable homicide not amounting to murder on the grounds, inter alia, that based on the pathologist's evidence it was not proven beyond reasonable doubt that the

injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death.

[12] With respect to the appellant's counsel, these cited cases are distinguishable on the facts. In *Cheong*'s case the pathologist stated that:

> The injury to the head can cause death whereas the others are not fatal by itself.
>
> This kind of injury, the chances of survival to a human. In this particular case, the chances is very slim because the injury on the face and on the head (see p 71 of appeal record Vol 1).

This led the court to conclude as follows:

> [22] It is to be noted SP10 is quite certain in her evidence that apart from injuries to the head, the other injuries by themselves were not fatal. In cross-examination by the defence as regards which injury caused the death, SP10 stated that some on the face and neck of the deceased and this is an accumulative effect rather than single injury. *It is therefore clear that the injuries which cause the death to the deceased were those on the face and neck, not the head and that those injuries are not fatal by themselves*. (Emphasis added.)

In this case before us, there was no such qualification given by PW9 who unequivocally said that the severance of the artery caused profuse bleeding which led to his death.

[13] In *Mohd Yasser*'s case the pathologist's evidence was that the injuries caused by the appellant to the deceased (by hitting his head five times with a helmet) caused the death of the deceased because medical treatment was not rendered quickly enough to the deceased for he was brought to the hospital late and died two days after admission. The court therefore surmised that 'the injury suffered by the deceased was not ipso facto fatal' for if he had received medical treatment he would be saved.

[14] Now, although in this case before us the pathologist also stated at p 228 Vol 2 of the appeal record that the injuries if not given medical treatment would be fatal, she however said 'immediate medical treatment'. It was therefore not a question of delayed treatment as in *Mohd Yasser*'s case. On the facts of this case there was simply no way such an immediate treatment could be available as the incident did not happen at the hospital nor was there evidence of a doctor present at the time of incident. In other words, there was no possibility of a supervening event which would avoid the fatality of the injuries suffered by the victim. After all, as held in *Mohd Yasser*'s case, the test whether the injury sustained was sufficient in the ordinary course of nature to cause death to the victim is an objective one. And viewing it objectively, in the facts and circumstances of this case as alluded to earlier, there was no way the deceased

could have survived the particular injury which caused his death which was the severance of the artery that caused profuse bleeding. In this regard and with respect even though the use of the word 'infer' by the learned judicial commissioner may be unfortunate but nonetheless his ultimate finding, that the ingredients under s 300(c) of the Penal Code had been satisfied was right.

CONCLUSION

[15] Therefore on this sole issue raised before us and with which we could not agree with the appellant, the appeal was dismissed.

Appeal dismissed.

Reported by Dzulqarnain Ab Fatar